

M e m o r a n d u m

To: James J. Morgester, Chief
Compliance Division

Date: April 8, 1986

Through: David Nawi
General Counsel

Subject: Legal Opinion on
Variances from Authority
to Construct and permit
to Operate Rules; Orders
of Abatement

From: W. Thomas Jennings,
Staff Counsel
Air Resources Board

This legal opinion is in response to your memorandum of January 15, 1986, in which you posed three questions regarding variances and orders of abatement as they relate to rules requiring authorities to construct and permits to operate. You indicate that the questions have arisen from your review of the San Joaquin County Air Pollution Control District variance program. In accordance with a February 4 conversation with Dan Donahue, Manager of your Program Review Section, I address the questions posed in slightly modified form,

SUMMARY

1. Health and Safety Code Section 42350 prohibits issuance of a variance from a district Authority to Construct rule.

2. Health and Safety Code Sections 42450 and 42451 authorize district boards and hearing boards respectively to issue orders of abatement arising from violation of a district Permit to Operate rule.

3. Hearing boards are not automatically precluded from issuing variances from Permit to Operate rules.

ANALYSIS

Question No. 1: May a variance be issued from a district Authority to Construct rule?

Discussion: The typical Authority to Construct rule provides that any person building altering or replacing any equipment, the use of which may cause the issuance of air contaminants or the use of which may eliminate or reduce or control the

issuance of air contaminants, shall first obtain an Authority to Construct from the Air Pollution Control Officer (APCO) (e.g., San Joaquin District Rule 201(a)). Health and Safety Code Section 42350 provides, in part,

“... if the district board established a permit system by regulation pursuant to Section 42300, a variance may not be granted from the requirement for a permit to build, erect, alter, or replace.”

By its unambiguous terms, Section 42350 clearly prohibits issuance of a variance from any district Authority to Construct rule.

Question No. 2: May an order of abatement be issued upon a finding that a source is operating without a Permit to Operate required by district rules?

Discussion: Health and Safety Code Sections 42450 and 42451 authorize a district board and hearing board, respectively, to issue an order of abatement upon a finding that a person is in violation of, inter alia, any regulation “prohibiting or limiting the discharge of air contaminants into the air.” The quoted language has been in the statutes without material change since at least 1970. An order of abatement may be issued for violation of a Permit to Operate rule as long as the rule is determined to prohibit or limit the discharge of air contaminants. For the reasons set forth below, I conclude that Permit to Operate rules do fall within such a characterization and that orders of abatement may therefore be issued for violations of the rules.

The typical Permit to Operate rule provides that before a person may operate any equipment, the use of which may cause the issuance of air contaminants or the use of which may eliminate or reduce or control the issuance of air contaminants, the person must obtain a Permit to Operate from the APCO (e.g., San Joaquin District Rule 201(b)). Typical rules prohibit issuance of a Permit to Operate unless that applicant demonstrates that the equipment may be expected to operate without violating Section 41700 (nuisance) or 41701 (opacity) of the Health and Safety Code, or district rules (e.g., San Joaquin District Rule 207(a)).* For sources subject to New Source Review (NSR), issuance of a Permit to Operate is typically prohibited unless the source has obtained

* Health and Safety Code Section 42301(b) provides that a district permit system must “Prohibit the issuance of a permit unless the air pollution control officer is satisfied, on the basis of criteria adopted by the district board, that the article, machine, equipment, or contrivance will comply with all applicable orders, rules, and regulations of the district and of the state board and with all applicable provisions of this division.”

an Authority to Construct pursuant to the NSR rule, will comply with all conditions in the Authority to Construct, and has provided any necessary emissions offsets (e.g., San Joaquin District Rule 209.2). The APCO is generally authorized to issue any Permit to Operate subject to conditions which assure compliance with the applicable standards for granting permits (e.g., San Joaquin District Rule 208).

It is evident from the above description that Permit to Operate rules are generally designed to limit the discharge of air contaminants. A source will be issued a permit only if the APCO is satisfied the equipment will be operated in compliance with applicable standards. The APCO may impose conditions on the permit which contain express, source-specific limitations intended to assure compliance with the prohibition against nuisances and other restrictions. Both of these attributes of the permit system constitute mechanisms which can limit emissions.

In the case of sources subject to NSR, Permit to Operate rules have an even more explicit effect of limiting emissions. NSR rules typically provide that an Authority to Construct will not be issued unless the source demonstrates that best available control technology (BACT) will be used to reduce emissions to the maximum extent feasible. (E.g., San Joaquin District Rule 209.2.) The BACT requirement is not contained in any of the district rules establishing emission standards. Since a Permit to Operate will not be issued absent a determination that the source will comply with all of the conditions of the Authority to Construct, it is the permit rule itself that imposes the BACT requirements. NSR rules also prohibit operation of a larger new or modified source in a nonattainment area unless the source has provided emissions offsets through actual reductions in emissions from identified sources; the offset provisions similarly serve to limit the overall allowable discharge of air contaminants.

The requirement that a permit be obtained is much more than a mere procedural formality. The permit system is probably the single most important mechanism used by districts in their efforts to control emissions of air pollutants. Operation without a permit, either because of failure to seek a permit or in the face of a permit denial, effectively frustrates the districts' central control program. In limiting orders of abatement to situations where the rule being violated prohibits or limits the discharge of air contaminants, it appears that the Legislature sought to preclude use of this serious remedy where violations are strictly procedural and do not impact directly on air quality. In light of the key role of district permit rules, it is unlikely that the Legislature intended totally to withdraw the order of abatement remedy in situations where a source is operating without a required Permit to Operate.

Finally, although neither the appellate courts nor commentators have directly addressed the issue, a recent court decision and a recent law review article are wholly consistent with my conclusion. Julius Goldman's Egg City v. Air Pollution Control District of Ventura County, 116 Cal.App.3d 741 (1981) involved appellate review of a superior court writ of mandate. The writ ordered a district board to set aside its order

of abatement prohibiting a source from operating specified pieces of equipment without Permits to Operate. The Court of Appeals reversed issuance of the writ with reference to one piece of equipment and upheld it with reference to another piece of equipment. Although the court's opinion did not discuss whether Section 42450 authorizes an order of abatement for violation of a Permit to Operate rule and the issue was apparently not briefed by any party, it is noteworthy that the Court of Appeals did in fact let stand an order of abatement prohibiting operation of a source without a Permit to Operate.

The use of abatement orders by district hearing boards in California is discussed in Manaster, "Administrative Adjudication of Air Pollution Disputes: The Work of Air Pollution Control District Hearing Boards in California," 17 U.C.D.L.Rev. 1117 (1984). The author states,

"Although theoretically available against violators of any regulation 'prohibiting or limiting the discharge of air contaminants,' abatement orders in many districts are most frequently sought against violators of the statutory public nuisance provision or of basic requirements of district permit systems. (Emphasis added, footnotes omitted.)

Implicit in this statement is the author's conclusion that the basic requirements of Permit to Operate rules do constitute prohibitions or limitations on the discharge of air contaminants.

Question No. 3: May a variance be issued from a Permit to Operate rule in light of the requirements of Health and Safety Code Section 42352?

Discussion: Health and Safety Code Section 42300 is the basic statute authorizing districts to establish permit systems. Section 42300 provides that districts may establish by regulation a system that requires any person to obtain a permit before the person "builds, erects, alters, replaces, operates, or uses any article, machine, equipment, or other contrivance which may cause the issuance of air contaminants." Health and Safety Code Section 42350 authorizes any person to apply to the hearing board for a variance from the rules of the district. As noted in the discussion above of Question No. 1, Section 42350 goes on to prohibit issuance of a variance from any rule requiring a permit "to build, erect, alter, or replace." The Legislature's failure to include references in Section 42350 to a permit to "operate or use" — the last two activities for which permits are authorized by Section 42300 — evidences a clear legislative intent that hearing boards are not precluded from issuing variances from permit to operate requirements in appropriate circumstances.

Health and Safety Code Section 42352 specifies three findings which must be

made before a hearing board is authorized to issue a variance. The second required finding is:

"That, due to conditions beyond the reasonable control of the petitioner, requiring compliance would result in either (1) an arbitrary or unreasonable taking of property, or (2) the practical closing and elimination of a lawful business."

(See generally, Manaster, *supra*, 17 U.C.D.L. Rev. 1117, 1125-1128.) The required finding that the conditions are beyond the reasonable control of the petitioner may be difficult to make in many variance proceedings involving Permit to Operate rules. However, for the reasons discussed above, hearing boards are not automatically forbidden in all instances to grant variances from Permit to Operate rules.